Filed 5/15/19 P. v. Mixon CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. LAURENCE CAURELIOLA MIXON, Defendant and Appellant.	D074572 (Super. Ct. No. FVI1600254)

APPEAL from a judgment of the Superior Court of San Bernardino County, John M. Tomberlin, Judge. Affirmed in part; reversed in part; remanded with directions.

Ellen M. Matsumoto, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Scott C. Taylor, Robin H. Urbanski and Brendon W. Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

A jury found Laurence Caureliola Mixon guilty of the first degree murder of Brandon Huff (Pen. Code,[1] § 187, subd. (a)) (count 1) and the battery of E.B. (§ 242) (count 2).[2] The jury further found that Mixon personally used a knife during the commission of the murder (§ 12022, subd. (b)(1)). During the trial, outside the presence of the jury, Mixon admitted that he had suffered a prior robbery conviction that constitutes a serious felony for purposes of the Three Strikes law (§§ 1170.12, subds. (a)–(d), 667, subds. (b)–(i)) and a serious felony for purposes of section 667, subdivision (a)(1). Mixon also admitted that he had served three prior prison terms (§ 667.5, subd. (b)). The trial court sentenced Mixon to an aggregate term of 58 years to life in prison. On count 1, the court sentenced Mixon to a total of 58 years in prison. The court sentenced Mixon to 50 years to life in prison for the underlying offense, consisting of 25 years to life doubled due to the prior strike. (§§ 1170.12, subd. (c)(1), 667, subd. (e)(1).) The court also imposed a consecutive five-year term for the serious felony enhancement (§ 667, subd. (a)(1)), two consecutive one-year terms for two of the three prison priors

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1 Unless otherwise specified, all subsequent statutory references are to the Penal Code.

2 In accordance with the California Supreme Court's policy regarding protective nondisclosure, we refer to the homicide victim by his full name. (See Cal. Style Manual (4th Ed. 2000) § 5:9.) Pursuant to California Rules of Court, rule 8.90, we refer to the victim of the battery by her initials in order to protect her personal privacy interests.

(§ 667.5, subd. (b)),[3] and a one-year consecutive term for the knife enhancement (§ 12022, subd. (b)(1)). On count 2, the court sentenced Mixon to a concurrent term of 180 days.

On appeal, Mixon claims that there is not substantial evidence of premeditation and deliberation in the record to support the jury's verdict, the trial court abused its discretion in admitting evidence that he had previously threatened one of the witnesses to the murder, and defense counsel's closing argument constituted ineffective assistance. In a supplemental brief, Mixon claims that the matter should be remanded for resentencing in light of a change in the law that permits the trial court to exercise its discretion to strike the serious felony enhancement (§ 667, subd. (a)(1)). (See Sen. Bill No. 1393 (2017–2018 Reg. Sess.) § 2.) The People concede that the matter should be remanded to the trial court to permit the trial court to consider whether to exercise its discretion to strike the serious felony enhancement (§ 667, subd. (a)(1)). We conclude that the matter must be remanded for a resentencing so that the trial court may consider whether to exercise its discretion to strike the serious felony enhancement (§ 667, subd. (a)(1)). In all other respects, we affirm.

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[3] With respect to the third prison prior, the trial court explained that "dual use does not permit us to use the prison prior and the strike."

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The People's Evidence*

1. *Mixon and Haslacker*

Mixon and Jessica Haslacker were married and had one child together, L.M. L.M. was approximately two years old on the date of the murder, January 30, 2016.[4]

2. *Mixon's relationship with Haslacker*

In August 2015, Haslacker obtained a restraining order against Mixon. The order, which remained in effect as of the date of the murder, prohibited Mixon from speaking with Haslacker or being within 100 yards of her. Approximately two weeks before the murder, Mixon left a voicemail message for Haslacker in which he threatened to break her neck.

3. *Mixon confronts Haslacker and takes their child from her*

Approximately a week and a half before the murder, Haslacker and her son moved into an apartment with Haslacker's cousin, E.B. On the evening of the murder, Mixon drove up next to Haslacker while she was walking on the street with her son near the apartment that she shared with E.B. Mixon angrily threatened to kill Haslacker or break her neck. Mixon got out of his car, forcefully took L.M. from Haslacker, and drove away with the child. After taking the child, Mixon again threatened to kill Haslacker.

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[4] Haslacker testified that, on the day of the murder, L.M. was "[a]bout two years old."

4. *The argument preceding the murder*

Haslacker walked back to the apartment. E.B., E.B.'s daughter, and E.B.'s boyfriend, Huff, were at the apartment.

Mixon began repeatedly calling Haslacker on the phone. He told Haslacker that he knew where she was staying. Mixon demanded that Haslacker pack L.M.'s belongings and bring them outside the apartment. Mixon also threatened to kill Haslacker, her mother, and her sisters. Mixon told Haslacker that he was going to "drag [her] out" of the apartment.

Haslacker packed L.M.'s backpack with "miscellaneous" items and walked outside of the apartment.[5] She saw Mixon and her son in Mixon's car, which was in the driveway of the apartment. Haslacker gave Mixon the backpack. Mixon became angrier upon seeing the items that Haslacker had packed.

Haslacker went back inside the apartment. Once Haslacker was inside, Mixon called Haslacker on the phone. Mixon told Haslacker to come outside or he was going to come inside and get her. Shortly thereafter, Mixon began banging on the apartment door, while demanding that Haslacker retrieve L.M.'s belongings.

E.B. opened the front door to the apartment. Haslacker was standing next to her. E.B. told Mixon that he had to leave. Mixon angrily responded, "Shut up, bitch." Huff

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[5] When asked by the prosecutor what Haslacker meant by "miscellaneous stuff," Haslacker explained, "Like maybe a shoe or a sock or a couple of diapers. Whatever was in sight in the room just so that the bag could look like it was full." Haslacker explained further that she wanted the bag to appear full so as to make it appear to Mixon as though she was cooperating with his demands.

stood behind Haslacker and E.B. Mixon threatened to "fuck . . . up" Huff. Huff was unarmed and did not behave in an aggressive manner.

5. *The battery and murder*

Mixon walked up to E.B. and "chest bump[ed]" her. In response, E.B. shoved Mixon back from the front door. Mixon then rushed toward E.B. and chest bumped her again, causing E.B. to hit her head and fall to the ground.

Huff moved toward Mixon and encountered him near the front door of the apartment. Mixon lunged forward and stabbed Huff on the side of his neck, causing Huff to stagger back into the apartment.

6. *Mixon flees*

After stabbing Huff, Mixon turned and ran to his car. Haslacker followed Mixon and retrieved her son from Mixon's car. Haslacker saw Mixon put a metallic object inside a pocket of the driver's-side door before he drove away.

7. *Huff's death*

Huff suffered a four-inch deep stab wound to the neck that caused his death.

8. *Mixon's arrest*

Law enforcement officers arrested Mixon in Utah two days after the murder.

B. *The defense*

Mixon testified that while he was arguing with Haslacker, E.B. intervened in the argument, told him to leave, and "got in [his] face." E.B. shoved Mixon and Mixon pushed E.B. in return. Immediately thereafter, Huff came out of the residence and

grabbed Mixon. Fearful for his life, Mixon reached into his sweater and grabbed a "weapon." According to Mixon, "It was a blade and I hit him one time."

During closing argument, defense counsel argued that the People had not established that Mixon committed first degree premediated and deliberate murder.

III.

DISCUSSION

A. *There is substantial evidence of premeditation and deliberation in the record to support the jury's verdict finding Mixon guilty of first degree murder*

Mixon claims that there is not substantial evidence of premeditation and deliberation in the record to support the jury's verdict finding him guilty of first degree murder.

1. *Standard of review*

In determining the sufficiency of the evidence to support a conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

2. *Governing law*

Section 189 provides in relevant part:

> "All murder that is perpetrated by . . . any . . . kind of willful, deliberate, and premeditated killing . . . is murder of the first degree."

" '[P]remeditated' means 'considered beforehand,' and 'deliberate' means 'formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action.' [Citations.] The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .' " (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.)

In *People v. Anderson* (1968) 70 Cal.2d 15 (*Anderson*), the Supreme Court identified three categories of evidence that are relevant in proving premeditation and deliberation: planning activity, motive, and the manner of killing. " 'However, . . . "*Anderson* does not require that these factors be present in some special combination or that they be accorded a particular weight, nor is the list exhaustive. *Anderson* was simply intended to guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse." ' " (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.)

3. *Application*

With respect to planning activity, " 'the most important prong of the *Anderson* test' " (*People v. Lucero* (1988) 44 Cal.3d 1006, 1018–1019), the People presented

evidence from which the jury could find that Mixon approached Haslacker and E.B.'s residence in a highly agitated, even murderous, state of mind. Specifically, the People presented evidence that, after making numerous death threats directed at Haslacker, Mixon armed himself with a sharp metallic object as he approached E.B. and Haslacker's residence just prior to the murder.

Mixon's statements to Huff just before the stabbing also supported a finding that, while at the doorway of the residence, in the moments before the homicide, Mixon planned the attack against Huff while in this murderous state of mind. Haslacker testified that before stabbing Huff, Mixon challenged Huff to a fight. E.B. testified that, just before the stabbing, Mixon said to Huff, "I'll fuck you up, too, white boy."

Evidence that Mixon armed himself with sharp metallic object just before the murder, and that he threated to "fuck . . . up" Huff just before stabbing him, constitutes evidence from which the jury could reasonably find that Mixon planned the killing.

With respect to motive, the People presented evidence from which the jury could have reasonably found that Mixon perceived that Huff was siding with Haslacker in her dispute with Mixon. Specifically, Haslacker testified that during the encounter that resulted in the murder, Huff told Mixon that he had to leave. In addition, Haslacker and E.B. testified that Mixon became angry at Huff. Haslacker testified that Mixon said to Huff, "[f]uck you, white boy," and something to the effect of, "[w]ho the fuck are you?" E.B. testified that Mixon said to Huff, "What are you looking at, white boy? What the fuck are you gonna do, white boy?" From this evidence, the jury could "reasonably infer a 'motive' to kill the victim." (*Anderson, supra,* 70 Cal.2d at p. 27.)

Finally, the manner of killing supports a finding of premeditation and deliberation. The People presented evidence that Mixon inflicted a single, four-inch deep stab wound through Huff's neck, which severed a major artery in his neck, entered his chest cavity and punctured a major blood vessel in his chest. This evidence strongly supports a finding that the "manner of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way." (*Anderson*, *supra*, 70 Cal.2d at p. 27 [reviewing case law and stating that "strong evidence of type (3) [manner of killing]," was present in case in which defendant "directly plung[ed] a lethal weapon into the chest" of the victim].)

Accordingly, we conclude that there is substantial evidence of premeditation and deliberation in the record to support the jury's verdict finding Mixon guilty of first degree murder.

B. *Mixon forfeited his claims that the trial court erred in admitting evidence that he had threatened Haslacker on several occasions prior to the murder pursuant to Evidence Code section 1101, subdivision (b) and that the court erred in failing to exclude such evidence pursuant to Evidence Code section 352*

Mixon claims that the trial court abused its discretion in admitting evidence that he had threatened Haslacker on several occasions prior to the murder pursuant to section Evidence Code section 1101, subdivision (b). Mixon contends that such evidence was inadmissible under Evidence Code section 1101, subdivision (a) because it constituted "pure propensity evidence" designed to "show that [Mixon] was a violent and abusive person, prone to kill." Mixon further claims that the trial court erred in failing to exclude such evidence pursuant to Evidence Code section 352.

We conclude that Mixon failed to preserve these contentions since he did not raise objections under Evidence Code sections 1101 or 352 in the trial court.

1. *Governing law*

a. *Evidence Code sections 1101 and 352*

Evidence Code section 1101 provides in relevant part:

> "(a) [E]vidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.
>
> "(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

Evidence Code section 352 provides:

> "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

b. *Forfeiture*

A reviewing court may not reverse a judgment based on a trial court's purported erroneous admission of evidence unless the appellant objected to the admission of the evidence in the trial court on the specific ground urged to be erroneous on appeal.

Evidence Code section 353 provides:

> "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:
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> "(a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and
>
> "(b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice."

" 'Specificity is required . . . [in part] to enable the [trial] court to make an informed ruling on the motion or objection . . . . ' " (*People v. Pearson* (2013) 56 Cal.4th 393, 438.)

The California Supreme Court has repeatedly held that a relevance objection does not sufficiently preserve an appellate claim that evidence is inadmissible propensity evidence under Evidence Code section 1101. (See e.g. *People v. Valdez* (2012) 55 Cal.4th 82, 130 (*Valdez*).) In reaching this conclusion in *Valdez*, the Supreme Court reviewed its prior decisions on the issue as follows:

> "Here, in objecting to the gang-related evidence, defense counsel neither mentioned Evidence Code section 1101 nor asserted that the evidence constituted inadmissible character evidence. Defense counsel did make various *other* objections to some of the evidence in question, including that it was irrelevant, cumulative, lacking in foundation, or prejudicial. However, these objections were insufficient to preserve for appeal the claim that the evidence was inadmissible under Evidence Code section 1101, subdivision (a). (*People v. Doolin* (2009) 45 Cal.4th 390, 437 [trial objection that evidence 'was irrelevant and unduly prejudicial under Evidence Code section 352' was insufficient to preserve for appeal claim under Evidence Code section 1101]; *People v. Demetrulias* (2006) 39

> Cal.4th 1, 19–21 [trial objection that evidence was irrelevant, speculative and lacked foundation was insufficient to preserve for appeal claim under Evidence Code section 1101]; *People v. Guerra* (2006) 37 Cal.4th 1067, 1117 [relevance objection at trial was insufficient to preserve for appeal objection that testimony was inadmissible character evidence])." (*Ibid.*)

In *Demetrulias*, *supra*, 39 Cal.4th at page 21, the Supreme Court explained one reason why a relevance objection does not sufficiently preserve an objection under Evidence Code 1101:

> "Contrary to defendant's argument, a relevance objection does not, in itself, alert the trial court to the claim that the testimony objected to is inadmissible character evidence. Evidence of a character trait has a 'tendency in reason' (Evid. Code, § 210) to prove the person's conduct in conformity with that trait on a particular occasion. Indeed, the Law Revision Commission comment to Evidence Code section 1100 notes that '[e]vidence of a person's character or a trait of his character is relevant . . . when offered as circumstantial evidence of his conduct in conformity with such character or trait of character.' (Cal. Law Revision Com. com., 29B pt. 3 West's Ann. Evid. Code (1995 ed.) foll. § 1100, p. 431.) The general rule against its use for this purpose (Evid. Code, [§] 1101, subd. (a)) is founded not on lack of relevance but on 'Extrinsic Policies' (*id.*, tit. of div. 9) relating to prejudice, the potential for the jury to be distracted and base its decision on the parties' characters themselves, and the potential for confusion of the issues and extended inquiry into collateral matters. (See Cal. Law Revision Com. com., *supra*, foll. § 1101, p. 438.)"[6]

The Supreme Court has also made clear that a defendant must specifically raise an objection under Evidence Code section 352 in order to preserve an appellate claim under

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6 (See *People v. Falsetta* (1999) 21 Cal.4th 903, 915 [evidence that a defendant has previously committed other sex offenses is "circumstantially *relevant* to the issue of his disposition or propensity to commit these offenses," and referring to case law supporting the proposition that "propensity evidence is *relevant* but tends to 'overpersuade' the jury" (second italics added)].)

this provision. (See *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 413 (*Bryant*) ["[defendant] made no [Evidence Code] section 352 objection below. Any appellate claim on that ground is forfeited"]; *Valdez, supra*, 55 Cal.4th at p. 138 ["Insofar as defendant argues the evidence was inadmissible under Evidence Code section 352 because its potential to cause undue prejudice substantially outweighed its probative value, defendant forfeited this argument by failing to object on this basis at trial"].)

2. *Factual and procedural background*

a. *The People's motion in limine*

Prior to the trial, the People filed a document entitled, "Consolidated trial brief/motions in limine/witness and exhibit lists." (Capitalization and boldface omitted.) The document provided a statement of the facts as derived from the preliminary hearing testimony. The statement of facts indicated that the homicide arose out of a confrontation between Mixon and Haslacker pertaining to their child. The statement of facts also provided that, shortly before the homicide, Mixon had threatened to kill Haslacker and had forcibly taken their child from her.

In the motion in limine portion of the document, the People indicated that they wished to discuss the admissibility of a "[r]estraining [o]rder,"[7] for purposes of motive,

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7 The document did not further describe the nature of the restraining order. At the hearing on the motion in limine, the People explained that the restraining order listed Haslacker as the protected party.

Mixon does not raise any claim pertaining to the admission of evidence of the restraining order on appeal. However, we discuss the court's ruling on the admissibility of the restraining order since the trial court indicated that its ruling on the admissibility of the prior threats was "consistent with [its] ruling on the restraining order."

intent, planning, and lack of self-defense; the "[a]dmissibility of [p]rior [t]hreats by defendant as [e]vidence of [i]ntent;" and the admissibility of "[r]estraining [o]rder [u]nder Evidence [C]ode 1101(b)."

b. *The hearing on the People's motions in limine*

During a pretrial hearing, the court and the parties discussed the People's motions in limine. Mixon objected to admission of the restraining order on the ground that the legal effect of the restraining order had been "diminished" by Haslacker's statements to Mixon. The court overruled this objection and inquired whether the victim was "connected with" Haslacker.

After responding "[o]nly tangentially," the prosecutor argued that the restraining order was relevant to rebut an anticipated self-defense claim. The prosecutor continued, stating:

> "[T]here is evidence that Mr. Mixon made several threats to the protected party [Haslacker]. On the restraining order was his estranged wife [Haslacker] who was present and was one of the percipient witnesses. . . . [T]he threats that were made were made both weeks in advance and the day of the incident that Mr. Mixon was going to attack the percipient witness [Haslacker]. I believe that Mr. Mixon was at that location to attack that percipient witness [Haslacker], and . . . . while there[,] was confronted[,] and attacked the decedent [Huff] . . . ."

The court inquired whether Huff was "supposedly there to protect the protected person [Haslacker]." The prosecutor responded that Huff was attempting to protect Haslacker and her "cousin [E.B.] whom [Haslacker] was residing with."

After defense counsel stated, "Those are both matters of fact," the court retorted, "[I]t sounds like this is all contextual . . . ." The court continued:

> "I think that this is — these things don't happen in a vacuum. There are random acts of homicide that we have certainly witnessed too much of recently, both domestic and internationally. And if I were doing a trial on that, I would expect that the jury would hear such. If there's something that shows context that could be helpful in one way or the other for the jury to understand what is going on here, I think that it should go before the jury."

The court indicated that it would next consider the "admissibility of prior threats by defendant as evidence of intent."

Defense counsel responded, "I have an objection to that in the way that it's written, because it's so vague and I'm not quite sure."

In response to defense counsel's objection, the trial court asked for clarification from the prosecutor with respect to the nature of the threat evidence that the prosecution intended to present. The prosecutor stated that he sought to admit evidence of "a multitude of threats that culminated" in the events on the day of the charged offenses. The prosecutor explained further that all of the alleged threats had been made within two weeks of the homicide.

Defense counsel stated:

> "We have to keep in mind that this person, Ms. Haslacker, that had this restraining order and who allegedly received these threats is not the victim in this case. And there are no prior threats by the defendant to the victim or the victim's family or friends or relatives. And I don't believe that admissibility of prior threats to a different person would apply to Mr. Huff."

In response, the court ruled:

> "I think that it's all going to come in under the same circumstances that we discussed. I mean, it's part of the context of what seems to at least allegedly have taken place. We know that there's someone dead. How that person ended up dead and by whose hand that

> person ended up dead is something that [the prosecutor] has to prove. . . . I'm going to allow that to come in. It's all consistent with my ruling on the restraining order."

Immediately thereafter, after the prosecutor stated, "And because we are ruling on the restraining order —," the trial court interjected that "14 is automatically granted."[8]

c. *The trial*

At trial, the People presented evidence, without objection, that Mixon had threatened Haslacker on several occasions. Specifically, Haslacker testified that Mixon left a voicemail message for her approximately two weeks before the murder in which he threatened to break her neck. The People played a recording of the voicemail message. In addition, Haslacker testified about the numerous threats that Mixon made on the day of the murder, including a threat to kill Haslacker, her sisters, and her mother.

3. *Application*

In his brief on appeal, Mixon contends that the trial court should not have admitted the threat evidence because it constituted "pure propensity evidence," and maintains that "Evidence Code section 1101, subdivision (a) expressly excludes the prosecution's use of a defendant's uncharged offense as propensity evidence." He also recites a series of factors governing the admission of evidence of a defendant's other crimes under *People v. Thompson* (1980) 27 Cal. 3d 303, 314 and its progeny. However, in the trial court, Mixon did not object to the threat evidence on the ground that such evidence constituted

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8 The court was referring to number 14 of the People's motions in limine, which stated, "Discussion of Admissibility of Restraining Order Under Evidence [C]ode 1101[, subdivision](b)."

improper propensity or character evidence, and he neither raised any objection under Evidence Code section 1101, nor referred to any of the factors governing the admission of other crimes evidence.

In his reply brief, Mixon argues that the gist of one of defense counsel's statements in the trial court was that "[Mixon's] prior bad acts of death threats did not have a nexus to the murder of a person who was not the subject of [Mixon's] death threats." We agree that defense counsel's statement, made during the pretrial hearing, pertaining to the admissibility of such evidence, to the effect that counsel did not believe that the "admissibility of prior threats to a different person would apply to Mr. Huff," could be characterized as a relevance objection. However, as discussed above, the Supreme Court has repeatedly held that a relevance objection is *not* sufficient to preserve an objection under Evidence Code section 1101. (*Valdez, supra,* 55 Cal.4th at p. 138.) Accordingly, we conclude that Mixon forfeited the Evidence Code section 1101 claim that he seeks to raise on appeal.[9]

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9 To the extent that Mixon's brief may be read to raise a contention that the trial court abused its discretion in determining that the prior threat evidence was *relevant,* we reject that claim on its merits. The People's trial brief/motion in limine indicated that the homicide arose out of a confrontation between Mixon and Haslacker pertaining to their child and that Mixon perceived Huff to have taken Haslacker's side in the dispute. Evidence that Mixon had previously threatened to kill Haslacker was thus relevant in determining Mixon's intent in killing Huff. (See *People v. Megown* (2018) 28 Cal.App.5th 157, 166–167 ["evidence that [defendant] committed uncharged acts of domestic violence toward [girlfriend] in the past was relevant to prove that [defendant] not only threatened and assaulted [girlfriend] with a firearm during . . . incident, but that he also committed these crimes toward [girlfriend's mother] when [mother] came to [girlfriend's] aid"].)

With respect to Mixon's claim that evidence of his prior threats should have been excluded pursuant to Evidence Code section 352, Mixon failed to raise any such objection in the trial court. Thus, his claim on appeal based on this provision is forfeited, as well. (See, e.g., *Bryant, supra*, 60 Cal.4th at p. 423.)[10]

C. *Mixon has not established that defense counsel's closing argument constituted ineffective assistance*

Mixon claims that defense counsel's closing argument constituted ineffective assistance.

1. *Standard of review and governing law*

a. *Ineffective assistance of counsel*

Ordinarily, to establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient in that it "fell below an objective standard of reasonableness," evaluated "under prevailing professional norms." (*Strickland v. Washington* (1984) 466 U.S. 668, 688 (*Strickland*); accord, *People v. Ledesma* (1987) 43 Cal.3d 171, 216.) "When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance."

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10 In arguing that the purported error was prejudicial, Mixon notes that the trial court did not admonish the jury that the evidence of his prior threats was inadmissible to show that he "had a bad character and/or was predisposed to commit the crime." In light of our conclusion that Mixon forfeited the merits of his claim, we need not consider Mixon's argument as to prejudice. However, the law is clear that the trial court did not have a sua sponte duty to provide such a limiting instruction. (See *Valdez, supra*, 55 Cal.4th at p. 139; accord Evid. Code, § 355 ["When evidence is admissible . . . for one purpose and is inadmissible . . . for another purpose, the court *upon request* shall restrict the evidence to its proper scope and instruct the jury accordingly[ ]" (italics added)].)

(*People v. Mai* (2013) 57 Cal.4th 986, 1009.) Thus, "[w]hen the record on direct appeal sheds no light on why counsel failed to act in the manner [the defendant asserts counsel should have acted], defendant must show that there was ' " 'no conceivable tactical purpose' " for counsel's act or omission.' " (*People v. Centeno* (2014) 60 Cal.4th 659, 675.)

In *Yarborough v. Gentry* (2003) 540 U.S. 1 (*Yarborough*), the United States Supreme Court outlined the law governing ineffective assistance claims premised on defense counsel's closing argument:

> "The right to effective assistance extends to closing arguments. [Citations.] Nonetheless, counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage. Closing arguments should 'sharpen and clarify the issues for resolution by the trier of fact,' [citation], but which issues to sharpen and how best to clarify them are questions with many reasonable answers. Indeed, it might sometimes make sense to forgo closing argument altogether. [Citation.] Judicial review of a defense attorney's summation is therefore highly deferential . . . ." (*Id.* at pp. 5–6.)

Further, case law is clear that defense counsel enjoys considerable discretion in deciding whether to concede certain facts in closing argument. For example, in *Yarborough*, defense counsel told the jury that his client was a "bad person, lousy drug addict, stinking thief, [and a] jail bird." (*Yarborough, supra*, 540 U.S. at p. 9.) In analyzing these comments, the *Yarborough* court stated:

> "While confessing a client's shortcomings might remind the jury of facts they otherwise would have forgotten, it might also convince them to put aside facts they would have remembered in any event. This is precisely the sort of calculated risk that lies at the heart of an

> advocate's discretion. By candidly acknowledging his client's shortcomings, counsel might have built credibility with the jury and persuaded it to focus on the relevant issues in the case. See J. Stein, Closing Argument § 204, p. 10 (1992–1996) ('[I]f you make certain concessions showing that you are earnestly in search of the truth, then your comments on matters that are in dispute will be received without the usual apprehension surrounding the remarks of an advocate')." (*Id.* at pp. 9–10.)

In addition, the California Supreme Court has stated that defense counsel may reasonably determine that conceding some degree of guilt is necessary in order to maintain credibility with a jury. For example, in *People v. Freeman* (1994) 8 Cal.4th 450, 498 (*Freeman*) the court stated:

> "Recognizing the importance of maintaining credibility before the jury, we have repeatedly rejected claims that counsel was ineffective in conceding various degrees of guilt. (*People v. Mayfield* (1993) 5 Cal.4th 142, 177 [(*Mayfield*)]; *People v. McPeters* (1992) 2 Cal.4th 1148, 1186–1187 [counsel conceded defendant's presence at the crime scene, thus repudiating defendant's alibi testimony, but under the 'circumstances, we cannot say counsel was constitutionally ineffective in his attempt to make the best of a bad situation']; *People v. Mitcham*, *supra*, 1 Cal.4th at pp. 1060–1061 ['good trial tactics often demand complete candor with the jury, and . . . in light of the weight of the evidence incriminating a defendant, an attorney may be more realistic and effective by avoiding sweeping declarations of his or her client's innocence']; *People v. Breaux* (1991) 1 Cal.4th 281, 306–307; *People v. Jackson* (1980) 28 Cal.3d 264, 292–293.)"

b. McCoy *error*

While defense counsel enjoys "wide latitude," (*Yarborough*, *supra*, 540 U.S. at p. 5) in presenting closing argument, the United States Supreme Court recently held in *McCoy v. Louisiana* (2018) ___ U.S. ___ [138 S.Ct. 1500, 200 L.Ed.2d 821] (*McCoy*), that "a defendant has the right to insist that counsel refrain from admitting guilt, even

when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." (*McCoy*, *supra*, at p. 1505.) In reaching this conclusion, the *McCoy* court emphasized that, in that case, "the defendant vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." (*Ibid.*) For example, the record contained evidence that McCoy "was 'furious' when told, two weeks before trial was scheduled to begin, that [defense counsel] would concede McCoy's commission of the triple murders" (*id.* at p. 1506); "McCoy told [defense counsel] 'not to make that concession,' and [defense counsel] knew of McCoy's 'complet[e] oppos[ition] to [defense counsel] telling the jury that [McCoy] was guilty of killing the three victims' " (*ibid.*); and, during the trial, "McCoy protested; out of earshot of the jury, McCoy told the court that [defense counsel] was 'selling [him] out' by maintaining that McCoy 'murdered [his] family.' " (*Ibid.*)

The *McCoy* court explained that, "[p]reserving for the defendant the ability to decide whether to maintain his innocence should not displace counsel's, or the court's, respective trial management roles. See [*Gonzalez v. United States* (2008) 553 U.S. 242, 249] ('[n]umerous choices affecting conduct of the trial' do not require client consent, including 'the objections to make, the witnesses to call, *and the arguments to advance*') . . . . " (*McCoy*, *supra*, 138 S.Ct. at p. 1509, italics added; accord *Freeman*, *supra*, 8 Cal.4th at p. 498 ["The decision of how to argue to the jury after the presentation of evidence is inherently tactical"].) Further, the *McCoy* court made clear that, while defense counsel was not permitted to undermine his client's testimony proclaiming his innocence, counsel maintained the authority to exercise discretion in determining the

focus of counsel's closing argument, as long as such argument constituted effective assistance. (See *McCoy*, *supra*, at p. 1509 ["[Defense counsel] could not interfere with McCoy's telling the jury 'I was not the murderer,' although counsel could, if consistent with providing effective assistance, focus his own collaboration on urging that McCoy's mental state weighed against conviction"].)

The *McCoy* court also explained that the unequivocal evidence of McCoy's adamant objection to defense counsel's decision to concede McCoy's guilt distinguished the circumstances from those at issue in *Florida v. Nixon* (2004) 543 U.S. 175 (*Nixon*). In *Nixon*, the *McCoy* court explained, the United States Supreme Court "held that when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel's proposed concession strategy, [citation], '[no] blanket rule demand[s] the defendant's explicit consent' to implementation of that strategy." (*McCoy*, *supra*, 138 S.Ct. at p. 1505.)

Finally, the *McCoy* court explained that because the defendant's "autonomy, [and] not counsel's competence, is in issue, [the court did] not apply [its] ineffective-assistance-of-counsel jurisprudence, *Strickland*[, *supra*,] 466 U.S. 668," which requires a showing of prejudice. Rather, error under *McCoy* constitutes a "structural" error that requires reversal *without* a showing of prejudice. (*McCoy*, *supra*, 130 S.Ct. at p. 1511.)

2. *Factual and procedural background*

a. *Mixon's testimony*

During direct examination, Mixon testified that on the night of the homicide, he had an argument with Haslacker outside of E.B.'s residence. According to Mixon, E.B.

intervened in the argument, at first telling Mixon to leave, and then pushing him. Mixon claimed that after he shoved E.B. back, Huff came outside of the residence, "grabbed" Mixon, and the two began to "scuffle." Mixon claimed that Huff had a "stronghold" on him and, therefore, Mixon "reached into [his] sweater . . . and . . . grabbed a weapon." Mixon explained further, "It was a blade and I hit him one time."

During cross examination, Mixon testified that he had intended to reach into the pockets of his sweater for his keys, and that he had inadvertently grabbed a "blade" that was attached to his key chain. Mixon stated that he had "accidently" hit Huff with the blade.

b. *Defense counsel's closing argument*

Defense counsel argued that Mixon was guilty of manslaughter or, at most, second degree murder. Counsel argued as follows:

> "The Court has already instructed you that the provocation can make things look like first [*sic*]. It's not. Looks like murders [*sic*]. It's not. But when there's a sudden quarrel, intense emotions, then we are talking about murder in the second degree. We are talking about manslaughter.
>
> "There are two kinds of manslaughter as the Court has indicated to you. There's the manslaughter that means that you think you have a right to self-defense, but you don't. Then there's the manslaughter that says sudden quarrel, heat of passion and you're not the aggressor. *This case is manslaughter*. At the most, Second Degree Murder, a killing without — by someone that acts irrationally." (Italics added.)

Defense counsel also repeatedly argued that the evidence did not support a finding that Mixon had committed first degree murder. For example, counsel argued:

"So all of a sudden [the victim] comes around the door. He walks out. I don't know if his hands were on my client or what, but I do know that he came out half way between the car and the house because that is where his blood is.[11]

"Now, the question is, in those five seconds, in those five seconds, did what happened indicate rash, did it indicate intense emotion, or do you think that somebody, 'Time out. I've got to weigh the consequences here. I've got to deliberate about this for a few minutes.' There was no deliberation. There was no premeditation. There was just a rash act in seconds. That's what happened.

"Now, you know, it might have been different if you poison somebody. If you poison somebody, you have to think about it. You have to figure out how you're going to give him the poison. You have to figure out how you are going to get the poison, and how are you going to mix it up? Premeditation, deliberation, that is what it's all about.

"What if you put a bomb somewhere? You have to build the bomb, decide where to place it, how to do it without being seen. Premeditation deliberation where you lie in wait. You know, somebody is going to come along in a trail. So you hide in the bushes. You wait for him to come. You premeditated, deliberated. You weighed the consequences, and there it is.

"How about you chased somebody down. They are running away. You try to hurt them. They run away. You try to hurt them. Deliberation. But in a case like this where there is somebody that's dead within five to ten seconds of when you even know he's there, where is the premeditation and deliberation without forcing the square peg into the round hole? And that's what the government is doing here. *It's a second. There's no question about that*. It's not a first. All of the evidence points to that fact." (Italics added.)

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11 A detective testified that the crime scene, which included a blood trail, began "just outside the front door of the apartment," and continued "just inside the apartment."

3. *Application*

In his opening brief, Mixon argues that "[t]rial counsel's decision to concede that [Mixon] committed a murder when [Mixon] testified that he committed a voluntary manslaughter[12] was not reasonable because trial counsel completely undermined [Mixon's] credibility and actual[ly] told the jury that he did not believe his own client."

At the outset, we assume, but do not hold, that defense counsel conceded in his closing argument that Mixon was guilty of second degree murder.[13] However, we agree with the People that such concession was "a reasonable tactical decision," in light of "the state of the evidence."

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12 On appeal, Mixon argues that "essentially [his] defense [i.e., his testimony] was that what he committed was a voluntary manslaughter on the basis of imperfect self-defense." We note that Mixon's testimony could also be said to support an argument that he acted in lawful self-defense or that the killing was accident. Mixon testified that Huff attacked him "out of nowhere," and that Mixon "felt [his] life was in danger." Mixon also testified that he "accidently hit [Huff]" with a knife. The trial court instructed the jury that the homicide was lawful if Mixon acted in lawful self-defense or if he accidently killed Huff. However, Mixon presents no argument on appeal that defense counsel was required to argue that he acted in lawful self-defense or that the homicide was an accident.

13 We emphasize that we *assume* for purposes of this decision that defense counsel conceded Mixon's guilt of second degree murder, but we do not hold as much. We acknowledge that defense counsel stated, "It's a second. There's no question about that." However, an argument can be made that, in context, defense counsel was merely arguing that there was "no question," Mixon had *not* committed a *first* degree murder, and that Mixon was guilty of — at most — second degree murder. In addition, as Mixon acknowledges, defense counsel expressly argued "[*t*]*his case is manslaughter*," (italics added) which is *inconsistent* with the conclusion that defense counsel conceded that Mixon was guilty of second degree murder.

As discussed in greater detail in parts II and III.A, *ante*, the People presented compelling evidence that Mixon murdered Huff. To begin with, it was undisputed that Mixon stabbed[14] Huff to death. At trial, Mixon acknowledged "hit[ting]" Huff with a "blade." The People also presented undisputed forensic evidence that Mixon inflicted a four-inch deep stab wound to Huff's neck that resulted in his death.

On the question of Mixon's intent in stabbing Huff, it was undisputed that the stabbing arose from, as Mixon testified at trial, a "domestic dispute" between Mixon and Haslacker. Further, the People played for the jury a voicemail that Mixon left for Haslacker a few weeks before the homicide in which he threatened to break her neck. Haslacker also testified that on the day of the homicide, Mixon threatened to kill both her and members of her family. In addition, the jury could infer from the testimony of two eyewitnesses, Haslacker and E.B., that Mixon committed an unprovoked stabbing of Huff. At trial, Mixon admitted that, immediately after the incident giving rise to the charged offenses, he fled the scene and left the state.

Further, trial counsel could have reasonably assessed that the jury was unlikely to credit Mixon's testimony concerning the killing. In particular, trial counsel could have reasonably concluded that the jury was likely to view with skepticism Mixon's contention that he had intended to use his keys to fend off Huff, but that he had instead "accidentally" stabbed Huff with a "blade" that was attached to his key chain.

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14 To be more precise, it was undisputed that Mixon punctured Huff's skin with a "blade." Mixon testified, "I wouldn't say that I stabbed him. I would say that I hit him, you know, and it accidently punctured his skin by accident, you know."

Defense counsel could also reasonably have determined that the jury would disbelieve Mixon's testimony that he regularly carried, on a key chain, a three-inch fixed metallic "blade" sharpened on both sides. As the prosecutor argued in his closing argument:

> "Who knows what happens to the real knife, because Mr. Mixon describes a three-inch knife that's attached to a key. Doesn't make any sense. No one carries a fixed blade knife, not in a sheath, and keeps those keys on their person.
>
> "You hit a table, you hit a car, you bump into somebody else and you slice open your gut . . . ."

In addition, Mixon's testimony with respect to the period just before the argument leading to the homicide was less than compelling:

> "[The prosecutor]: So you drop off Ms. Haslacker and then you leave?
>
> "[Mixon:] Yes, sir.
>
> "[The prosecutor:] Did you forget that portion of the story when you were being asked by [defense counsel] on direct?
>
> "[Mixon:] No. I don't believe [defense counsel] asked me that question.
>
> "[The prosecutor:] Okay. So you left. Where did you go to?
>
> "[Mixon:] I can't remember.
>
> "[The prosecutor:] How long were you gone for?
>
> "[Mixon:] I can't remember.
>
> "[The prosecutor:] When did you come back?
>
> "[Mixon:] It was within a good timing.

"[The prosecutor:] A good timing?

"[Mixon:] Yes, sir."

Mixon also acknowledged at trial that he had given false statements to law enforcement officers who questioned him after his arrest, conceding, "I was lying." In addition, Mixon acknowledged that he had submitted a declaration prior to trial in which he stated that the "tool" used in the homicide was a " 'stainless steel box cutter' " that contained " 'a *single* side razor.' "[15] (Italics added.) Mixon acknowledged that this declaration had been "inaccurate."

Finally, in analyzing the jury's likely assessment of Mixon's credibility, defense counsel also could have considered that Mixon acknowledged at trial that he had previously been convicted of second degree robbery, "possession of a . . . firearm," and "assault with a deadly weapon likely to cause great bodily injury," and that, at the time of the homicide, Mixon had a "warrant out for [his] arrest for a probation violation."

Presented with such evidence, defense counsel could reasonably have determined that it was highly unlikely that the jury would credit Mixon's testimony as to his intent in stabbing Huff. Thus, it was reasonable for defense counsel to concede that Mixon was guilty of second degree murder, in an attempt to maintain credibility before the jury in arguing that Mixon was *not* guilty of premeditated and deliberate first degree murder. (See *Freeman*, *supra*, 8 Cal.4th at p. 498; *Mayfield*, *supra*, 5 Cal.4th at p. 177 ["It was not

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15 A forensic pathologist testified that Huff's stab wound was likely made by an object that was sharp on *both* sides, and that the wound was not consistent with having been made by an object such as a box cutter that has only *one* sharp side.

unreasonable to seek to avoid the death penalty by seeking a conviction on one count of second degree murder and one count of involuntary manslaughter on a plausible theory, when the prosecution's evidence put defendant at grave risk of two first degree murder convictions"].)

We also reject Mixon's argument that defense counsel "demonstrat[ed] his disbelief in his own client's testimony," by informing the jury that counsel was not certain whether Huff had placed his hands on Mixon. As noted in part III.C.2.b, *ante*, defense counsel stated, "I don't know if [Huff's] hands were on my client or what, but I do know that he came out half way between the car and the house because that is where his blood is." In making this argument, defense counsel effectively reminded the jury that he, and inferentially, the jury, could not be entirely certain of what had occurred because he was not present at the time of the charged offenses. The argument was entirely reasonable, and the United States Supreme Court endorsed a similar form of argument in *Yarborough*. (See *Yarborough*, *supra*, 540 U.S. at p. 11 ["there is nothing wrong with a rhetorical device that personalizes the doubts anyone but an eyewitness must necessarily have"].)

In his reply brief, Mixon contends that defense counsel "argued against his client without permission," (capitalization omitted) and that reversal is therefore required under *McCoy*, 138 S.Ct. 1500).

As with our analysis above, we assume for purposes of this decision that defense counsel conceded in closing argument that Mixon was guilty of second degree murder.[16] As discussed above, in *McCoy*, the United States Supreme Court held that "a defendant has the *right to insist* that counsel refrain from admitting guilt . . . ." (*McCoy*, *supra*, 138 S.Ct. at p. 1505, italics added.) That is because "[w]hen a client *expressly asserts* that the objective of '*his* defence' [(U.S. Const., Sixth Amend.)] is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt." (*Id.* at p. 1509, italics added.)

However, in this appeal, as Mixon acknowledges in his reply brief, "[Mixon] did not object to his attorney's concession." (Compare with *McCoy*, *supra*, 138 S.Ct. at p. 1505 [record contained voluminous evidence that defendant "adamantly objected to any admission of guilt"].) Further, there is no evidence that Mixon expressly asserted that the objective of his defense was to maintain his innocence of the offense of second degree murder. Nor is there any evidence in the record with respect to defense counsel's interactions with Mixon pertaining to counsel's planned summation, and such an objection cannot be inferred from Mixon's testimony alone. For example, defense counsel may have persuaded Mixon that his testimony was unlikely to have been viewed

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16 We again emphasize that we do not *hold* that defense counsel conceded that Mixon was guilty of second degree murder. We only assume as much because it is clear that even given this assumption, Mixon has not demonstrated error under *McCoy* in this direct appeal.

favorably by the jury[17] and that counsel's proposed summation offered the best tactical option. In sum, the record in this direct appeal contains no evidence that defense counsel violated Mixon's "right to *insist* that counsel refrain from admitting guilt," under *McCoy*. (*McCoy*, *supra*, at p. 1505; see *People v. Lopez* (2019) 31 Cal.App.5th 55, 66 [rejecting claim of *McCoy* error because "unlike in *McCoy*, there is no evidence that appellant raised any objection to his counsel's decision to concede guilt on the hit-and-run charge"]; compare with *People v. Flores* (2019) 34 Cal.App.5th 270, 280 [reversing pursuant to *McCoy* in case where defendant "repeatedly objected to counsel's concessions and expressed his desire to maintain his innocence" (capitalization & italics omitted)]; *People v. Eddy* (2019) 33 Cal.App.5th 472, 482 [concluding record established *McCoy* error where "defendant made clear that he had instructed his counsel not to concede manslaughter and that counsel had overridden this directive"].)[18]

Accordingly, we conclude that Mixon has not established that defense counsel's closing argument constituted ineffective assistance.

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17 As discussed above, the record contains ample evidence from which defense counsel could have reasonably determined that the jury was unlikely to believe Mixon's version of the events leading to the homicide.

18 We note that "[t]he general rule concerning appellate claims of ineffective assistance is that often the alleged deficiency of counsel is not shown by the record on appeal; such cases do not lead to reversal of the judgment on appeal; rather the defendant is relegated to the remedy of habeas corpus, wherein the defendant can bring forth evidence outside the record on appeal." (*People v. Bills* (1995) 38 Cal.App.4th 953, 962.) In so observing, we express no opinion on the merits of any potential habeas petition in this case.

C. *The matter must be remanded for resentencing to permit the trial court to consider whether to exercise its discretion to strike the serious felony enhancement (§ 667, subd. (a)(1))*

On September 30, 2018, after briefing in this appeal was complete, the Governor signed Senate Bill No. 1393 into law. (Stats. 2018, ch. 1013, §§ 1−2.) Effective January 1, 2019, sections 667 and 1385 permit trial courts to exercise discretion at sentencing to strike five-year prior serious felony enhancements in the "furtherance of justice." (*Id.* at §§ 1–2.) Previously, courts lacked such discretion. (§§ 667, former subd. (a)(1), 1385, former subd. (b).)

This new law applies retroactively to cases not yet final as of January 1, 2019. (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 971–972, citing *In re Estrada* (1965) 63 Cal.2d 740, 744−745.) Accordingly, we reverse Mixon's sentence and remand for a resentencing hearing, at which the court shall consider whether to strike Mixon's prior serious felony enhancement (§ 667, subd. (a)(1)).[19]

19 We express no opinion with respect to whether the trial court should exercise its discretion to strike the serious felony enhancement.

IV.

DISPOSTION

Mixon's sentence is reversed. The matter is remanded to the trial court for the limited purpose of conducting a resentencing hearing at which the trial court shall consider whether to exercise its discretion to strike the five-year serious felony enhancement (§ 667, subd. (a)(1)). In all other respects, the judgment is affirmed.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

DATO, J.